UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 20-CA-139745

Hobby Lobby Stores, Inc.,

Respondent,

and

The Committee to Preserve the Religious Right to Organize,

Charging Party.

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Dated: November 12, 2015

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INTRODUCTION

Respondent Hobby Lobby Stores, Inc. ("Hobby Lobby," the "Company," or "Respondent"), pursuant to Rule 102.46 of the National Labor Relations Board's ("NLRB's" or "Board's") rules, respectfully submits this brief in support of its contemporaneously filed Exceptions to the decision of Administrative Law Judge ("ALJ") Eleanor Laws, dated September 8, 2015 ("ALJD").[1] The ALJ erred in concluding that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act (the "Act" or "NLRA") by (1) maintaining and enforcing a Mutual Arbitration Agreement (the "MAA") requiring that all employment-related disputes be submitted to individual binding arbitration; (2) enforcing the MAA by asserting the MAA in litigation the Charging Party brought against the Respondent; and (3) maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board ("NLRB"). (ALJD p. 19.)

This case provides the Board an opportunity to overrule its decisions in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) ("*D.R. Horton I")*, enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013) ("*D.R. Horton II*") and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) ("*Murphy Oil I*"), enf. denied in relevant part, --- F.3d ----, 2015 WL 6457613 (5th Cir. Oct. 26, 2015) ("*Murphy Oil II*").[2] In *D.R. Horton I*, the Board held as a matter of first impression that an

[1] The Administrative Law Judge's decision is cited as "ALJD" followed by the appropriate page and line numbers.

[2] The Board has continued to apply and expand *D.R. Horton I*. *See Chesapeake Energy Corp.*, 362 NLRB No. 80 (Apr. 30, 2015); *200 East 81st Restaurant Corp. d/b/a Beyoglu*, 362 NLRB No. 152 (July 29, 2015) (holding a single employee's filing of an employment-related class or collective action is by definition concerted activity and thus protected by Section 7); *The Neiman Marcus Group Inc.*, 362 NLRB No. 157 (Aug. 4, 2015) (following and applying *D.R. Horton I* and *Murphy Oil*); *Countrywide Financial Corp.*, 362 NLRB No. 165 (Aug. 14, 2015) (holding employer's motion to compel individual arbitration pursuant to an arbitration agreement that is

employer violates the Act "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." *D.R. Horton I, supra*, slip op. at 1. Despite the Fifth Circuit's refusal to enforce *D.R. Horton I* in relevant part and the nearly universal rejection of *D.R. Horton I* by scores of Federal and state courts, the Board adhered to *D.R. Horton I* in *Murphy Oil I. Murphy Oil I, supra*, slip. op. at 5-18. On October 26, 2015, the Fifth Circuit again rejected the Board's *D.R. Horton* rationale as elaborated in *Murphy Oil I.* Hobby Lobby respectfully submits the Board should now acknowledge *D.R. Horton I* was wrongly decided and overrule it.

The ALJ's other findings are also unsupported by the record, contrary to law, and should be reversed.

STATEMENT OF THE CASE

The Charging Party filed the underlying unfair labor practice charge against Hobby Lobby (the "Charge") on October 28, 2014. (ALJD p. 1.) The Charge alleges Respondent "has maintained policies in a Mutual Arbitration Agreement which violates [sic] the rights of employees to organize and to engage in other concerted activity for mutual aid or protection." (Joint Ex. 2A.) The Charge further alleges Respondent's policies interfere with an alleged "religious right to have a Union which is protected by the federal law including the National Labor Relations Act and the Religious Freedom Restoration Act." (Joint Ex. 2A.) The Charging

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silent on whether employees may file class or collective employment claims violates *D.R. Horton I* and *Murphy Oil*); *PJ Cheese, Inc.*, 362 NLRB No. 177 (Aug. 20, 2015) (following and applying *D.R. Horton I* and *Murphy Oil*); *Leslie's Poolmart, Inc.*, 362 NLRB No. 184 (Aug. 25, 2015) (following and applying *D.R. Horton I* and *Murphy Oil*); *Amex Card Services Co.*, 36 NLRB No. 40 (Nov. 10, 2015).

Party claims this alleged interference constitutes an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act, as amended (the "Act"). (Joint Ex. 2A.)

On January 28, 2015, the Region issued a Complaint and Notice of Hearing (the "Complaint"). (Joint Exs. 2C & 2D.) Respondent filed its Answer and Affirmative Defenses to the Complaint on February 11, 2015. (Joint Ex. 2E.)

On April 9, 2015, the Region issued an Amended Complaint and Order Rescheduling Hearing (the "Amended Complaint"). (Joint Exs. 2F & 2G.) Respondent filed its Answer and Affirmative Defenses to the Amended Complaint on April 23, 2015. (Joint Ex. 2H.)

On June 2, 2015, Respondent and Counsel for the General Counsel filed a Joint Motion to Submit Stipulated Record to the Administrative Law Judge. (ALJD p. 1.) Thereafter, the Charging Party filed objections to the Proposed Stipulated Record, and the General Counsel and Respondent subsequently filed their respective reply briefs in response to the Charging Party's objections. (ALJD pp. 1-2.) On June 29, 2015, the ALJ issued her order granting the General Counsel and Respondent's joint motion to submit a stipulated record to the Administrative Law Judge. (ALJD p. 1.) On August 3, 2015, the parties filed their respective briefs on a joint stipulated record to the ALJ.

On September 8, 2015, the ALJ issued her decision finding that Hobby Lobby violated the Act as alleged. Specifically, the ALJ concluded that Hobby Lobby violated Section 8(a)(1) of the Act by (1) maintaining and enforcing a Mutual Arbitration Agreement (the "MAA") requiring that all employment-related disputes be submitted to individual binding arbitration; (2) enforcing the MAA by asserting the MAA in litigation the Charging Party brought against the Respondent; and (3) maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations

Board ("NLRB"). (ALJD p. 19.) The ALJ's decision should be overturned and the Amended Complaint dismissed.

QUESTIONS INVOLVED

1. Did the ALJ err in finding that Hobby Lobby violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement (MAA) requiring all employment-related disputes to be submitted to individual binding arbitration based on the Board's decisions in *D.R. Horton I* and *Murphy Oil I*, which were wrongly decided and should be overturned? [Exceptions 3, 4, 5, 6, 7, 11, 15, 16, 17, 18, 19, 20]

2. Did the ALJ err in finding that Hobby Lobby violated Section 8(a)(1) of the Act when it enforced the MAA by asserting the MAA in litigation the Charging Party brought against Respondent? [Exceptions 1, 2, 4, 5, 8, 9, 12, 14, 15, 16, 17, 18, 19, 20]

3. Did the ALJ err in concluding Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the NLRB? [Exceptions 10, 13, 16, 17, 18, 19, 20]

STATEMENT OF FACTS

I. The Parties

Hobby Lobby is a national retailer of arts, crafts, hobby supplies, home accents, holiday, and seasonal products. (ALJD p. 3.) Respondent operates about 660 stores located in 47 states. (ALJD p. 3).

The Committee to Preserve the Religious Right to Organize filed the underlying unfair labor practice charge against Respondent in this matter. (ALJD p. 1.)

II. Respondent's Employees

Hobby Lobby employs individuals in job titles including but not limited to the following: office clericals; security staff; cashiers; stockers; floral designers; picture framers; media buyers;

craft designers; graphic & web designers; production artists video tutorial hosts; leave assistants; production quality and compliance assistants; construction warehouse workers; customer service representatives; industrial engineers; inventory control specialists; maintenance technicians; packers/order pullers; photo editors; truck-trailer technicians; truck-trailer technician trainees; social media writers; sales and use tax accountants; and team truck drivers who transport Respondent's products across state lines. (ALJD p. 3.)

III. Hobby's Lobby's Mutual Arbitration Agreement

Among its policies and procedures Hobby Lobby has maintained a "Mutual Arbitration Agreement" applicable to applicants and employees (the "MAA"). (ALJD pp. 4-6.) All of Hobby Lobby's employees are required to enter into the MAA as a condition of employment with Respondent. (ALJD p. 4.)

The MAA that employees sign provides in pertinent part that the "Employee" and the "Company" agree to submit certain employment-related claims ("Disputes") to final and binding arbitration in lieu of filing a lawsuit in court. (Joint Ex. 2I at p. 55; Joint Ex. 2J at p. 56.) By entering into the MAA, the Employee and the Company specifically agree they "are giving up any right they might have at any point to sue each other." (Joint Ex. 2I at p. 56; Joint Ex. 2J at p. 57.)

The MAA provides the Employee and the Company will be the only parties to the arbitration of a Dispute under the MAA, "and that no Dispute contemplated in this Agreement shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party." (Joint Ex. 2I at p. 55; Joint Ex. 2J at p. 56.)

Notably, the MAA expressly affirms it does not comprise a waiver of the Employee's right to file claims with government agencies (such as the NLRB):

> By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state or municipal law (including the right to file claims with federal, state or municipal government agencies). Rather, Employee and Company are mutually agreeing to submit all Disputes contemplated in this Agreement to arbitration, rather than to a court.

(Joint Ex. 2I at p. 55; Joint Ex. 2J at p. 56.)

The MAA that applicants for employment with Respondent must sign, contains provisions substantially similar to those described above, applicable to Hobby Lobby's employees. (Joint Ex. 2K; Jt. Ex. 2L.)

IV. The Federal Courts' Repeated Enforcement of Hobby Lobby's MAA

On December 3, 2013, Respondent filed a motion in the United States District Court for the Eastern District of California seeking to dismiss individual and representative wage-related claims filed against Hobby Lobby under California law by a former employee in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.) ("*Ortiz*"). (Joint Ex. 2Y; Joint Ex. 2 at ¶5.) In the alternative, pursuant to the Federal Arbitration Act, Respondent moved to compel individual arbitration of plaintiff's claims under the MAA the plaintiff had signed when she began her employment. (Joint Ex. 2Y.)

On April 17, 2014, in *Jeremy Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVS-AN (C.D. Cal.) ("*Fardig*"), Respondent filed a motion seeking to dismiss a putative class action lawsuit alleging wage and hour claims against Hobby Lobby under California law. (Joint Ex. 2Z; Joint Ex. 2 at ¶5.) In the alternative, pursuant to the Federal Arbitration Act, Respondent moved to compel individual arbitration under the MAAs that each of the named plaintiffs had signed when they began employment with Respondent. (Joint Ex. 2Z.)

On June 13, 2014, the U.S. District Court granted Respondent's motion to compel individual arbitration under the MAA. *See Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025 (C.D. Cal. June 13, 2014). The *Fardig* court rejected the plaintiffs' arguments the MAA

was unenforceable under California law as allegedly unconscionable and unenforceable under the National Labor Relations Act ("NLRA") pursuant to the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) ("*D.R. Horton I")*, enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013) ("*D.R. Horton II*"). 2014 WL 2810025, at *3-*7. With respect to the NLRA argument, the *Fardig* court held:

> The Court concludes that following the NLRB's reasoning on this issue would conflict with the [Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*,] and the Supreme Court's decision in *Concepcion* strongly favoring enforcement of arbitration agreements and strongly against striking class waiver provisions. Plaintiffs have cited no contrary authority, and the Court thus concludes that neither the NLRA nor the related Norris–LaGuardia Act renders the class waiver provision in the Agreement unenforceable.

Id. at *7 (internal citations omitted).

On October 1, 2014, another U.S. District Court in *Ortiz* granted Respondent's motion to compel individual arbitration under the MAA. *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070 (E.D. Cal. 2015). Like the *Fardig* court, the *Ortiz* court rejected the plaintiff's attempts to challenge the enforceability of the MAA on multiple grounds, including as allegedly unconscionable under state law and as violating the NLRA. *Id.* at 1077-1083. With respect to the NLRA and the Board's decision in *D.R. Horton I*, the *Ortiz* court held:

> In *Horton I*, the NLRB held that an agreement compelling employees to waive their right to engage in concerted activity was an unfair labor practice, and concluded that the FAA did not preclude this rule because the rule is consistent with the FAA's savings clause. The Fifth Circuit Court reviewed and rejected the NLRB's decision in *Horton I*, finding that the NLRB's rule did not fall within the FAA's savings clause. The Court reasoned that the rule favored class proceedings over individual arbitration and therefore interfered with the objectives of the FAA. The *Fardig* Court similarly concluded that the NLRB's reasoning in *Horton I* conflicts with the FAA and the Supreme Court's decision in *Concepcion*, which strongly favors the enforcement of arbitration agreements and strongly disfavors striking class waiver provisions.
>
> Based on federal law, the Court finds that neither the NLGA nor the NLRA render the Arbitration Agreement substantively unconscionable.

Id. at 1082-83 (internal citations omitted).

SUMMARY OF ARGUMENT

The ALJ, following the Board's decisions in *D.R. Horton I* and *Murphy Oil I,* found that Hobby Lobby's successful motions to compel individual arbitration constituted an unfair labor practice under the Act. The Fifth Circuit Court of Appeals refused to enforce the core holdings of *D.R. Horton I* and *Murphy Oil I.* The Board should now overrule *D.R. Horton I* and *Murphy Oil I* consistent with the scores of federal and state courts that have universally rejected those decisions. The Board should reverse the ALJ's decision and dismiss the Complaint.

ARGUMENT

I. The Board should overturn *D.R. Horton I* and *Murphy Oil I*.

Well-reasoned precedent from dozens of Federal and state courts as well as further experience should persuade the Board that *D.R. Horton I* and *Murphy Oil I* were wrongly decided and should now be overruled.

A. The Board is not bound by *stare decisis* to adhere to *D.R. Horton I* and *Murphy Oil I*.

The doctrine of *stare decisis* does not require that Board decisions be unchangeable; rather, the question is in each case whether the policy, standard or decision is erroneous. *NLRB v. Kostel Corp.*, 440 F.2d 347, 350 (7th Cir. 1971). As the Supreme Court has noted:

> The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development … of the national labor law would misconceive the nature of administrative decisionmaking. "'Cumulative experience' begets understanding and insight by which judgments … are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."

NLRB v. Weingarten, 420 U.S. 251, 266 (1975) (*citing NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)).

In appropriate circumstances, the Board has not hesitated to overturn its precedent on numerous occasions. *See, e.g., Babcock & Wilcox Construction Co.*, 361 NLRB 132 (2014) (finding that existing standard does not adequately balance the protection of employees' rights under the Act and the national policy of encouraging arbitration of disputes arising over the application or interpretation of a collective-bargaining agreement); *Lamons Gasket Company*, 357 NLRB 72 (2011) (holding that approach taken in prior decision was flawed and returning to previous rule); *Oakwood Care Center*, 343 NLRB 659 (2004) (concluding that prior Board case was wrongly decided, and returning to previous precedent); *Levitz Furniture Co. of the Pacific*, 333 NLRB 105 (2001) (overruling precedent based on legal and policy reasons).

The Board should follow a similar path here, returning to its pre-*D.R. Horton I* view that class action waivers in arbitration agreements do not violate the Act.[3]

B. The Board should not follow its policy of nonacquiescence.

It also would not be appropriate for the Board to continue to pursue its policy of nonacquiescence in this and similar cases addressing *D.R. Horton I*.

After the Fifth Circuit refused to enforce *D.R. Horton I* in relevant part, the Board invoked its nonacquiescence policy in *Murphy Oil I* to reaffirm and adhere to that decision. *Murphy Oil*, supra, slip op. at 2 n.17 (declining to follow *D.R. Horton II*, 737 F.3d 344). Under this policy, the Board states it will determine for itself "whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise."

[3] *D.R. Horton I* reversed an ALJ's decision in which the ALJ held he was "not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims." *D.R. Horton I, supra*, slip op. at 16; *see also* NLRB General Counsel Memorandum GC 10-06 (employees may waive all rights to file class arbitration and litigation, so long as they can concertedly challenge the enforceability of the agreement containing the waiver without retaliation).

Pathmark Stores, Inc. & Local 342-50, United Food & Commercial Workers Union, Afl-Cio, 342 NLRB 378, 380 (2004). The Board has explained it believes its policy of nonacquiescence "serves important goals: it defines a uniform national labor policy, as distinct from a patchwork of geographically diverse rules; and it frees the Board from attempting to anticipate with precision the locus of appellate jurisdiction." *D.L. Baker, Inc.*, 351 NLRB 515, 539 (2007) (internal citations omitted). *See also* Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L. J. 679, 709 (1989).

Considering the purposes of its policy, the Board should now acquiesce to the contrary views expressed by the Fifth Circuit in *D.R. Horton II*, *Murphy Oil II*, and by nearly every Federal and state court to address these issues.[4] First, the rejection by the Fifth Circuit and most other courts of *D.R. Horton I* over the past two and a half years has been premised in large part on those courts' interpretation of laws other than the Act, including the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq.; the Federal Rules of Civil Procedure ("Federal Rules"); the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.; the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. §§ 101 et seq.; and Supreme Court and Court of Appeals precedent, all of which are outside the Board's expertise and jurisdiction to define a "national labor policy." There is no reasoned basis for the Board not to acquiesce to U.S. Courts of Appeals' and other courts' consistent interpretation of laws other than the Act.

Second, there will be no risk of a "patchwork of geographically diverse rules" with respect to the enforceability of individual employment arbitration agreements if the Board acquiesces. To the contrary, decisions in diverse jurisdictions are overwhelmingly uniform in finding such agreements lawful and enforceable. The only threat to uniformity on this issue is

[4] *See Murphy Oil I*, *supra*, slip op. at 36 n.5 (Johnson, dissenting) (collecting citations to dozens of Federal and state courts rejecting *D.R. Horton I*).

posed by the Board itself, which under *D.R. Horton I* and *Murphy Oil I* is deeming arbitration agreements that courts have found enforceable and motions to compel that courts have granted to be unlawful under the Act. Even advocates of policies of nonacquiescence recognize there must be reasonable limits on such policies in the face of overwhelming judicial opposition to an agency's position. As two commentators have noted:

> [E]ven in the absence of Supreme Court review, at some point the law in a particular circuit and across circuits will no longer be in flux. [T]he means are available under [Administrative Procedure Act]-style rationality review, possibly the [Equal Access to Justice Act] and, in egregious cases, the courts' own injunctive powers to prevent nonacquiescence that is not adequately justified.

Estreicher & Revesz, *supra*, at 727. Here, the Board's continued nonacquiescence in the face of nearly universal judicial rejection of *D.R. Horton I* imposes undue costs, creates unnecessary confusion, burdens litigants and the courts, and ultimately risks undermining respect for Board orders. As one Board Member warned in similar circumstances:

> [R]ather than promote uniformity, the Board's policy of nonacquiescence has fostered a bifurcated system in which litigants willing to pursue their case to the appellate level are able to avoid Board orders. Thus, the Board's policy has had the unintended effect of needlessly protracting litigation, establishing a two-tier system of labor law in the same judicial jurisdiction, encouraging disrespect for Board orders, and antagonizing the courts. The two-tier system places an undue burden on those litigants who lack the resources to pursue matters to the circuit court level. Even worse, it compels them to expend resources in litigating cases in which it is clear that the appropriate circuit will not enforce the Board's order. I believe it inappropriate for the Board to continue this practice.

Arvin Indus., 285 NLRB 753, 762 (1987) (Chairman Dotson, dissenting). Notably, the Fifth Circuit recently warned that "[t]he Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders" in the Board cases continuing to apply *D.R. Horton I*. *Murphy Oil II*, 2015 WL 6457613, at *6.

Because continued nonacquiescence here would not serve the purpose of defining a uniform national labor policy but rather would undermine the uniform application of law outside

the Board's jurisdiction, Hobby Lobby respectfully submits the Board should, and must, acquiesce to the contrary decisions of the Fifth Circuit and the scores of other courts that have rejected *D.R. Horton I*.

II. The NLRA does not grant employees a right to access class procedures created by other laws.

The Board's authority under the NLRA is limited, and the Board's constructions of the Act must be rational and consistent with it. *See NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 576 (1994) (Board's interpretation was irrational and inconsistent with the NLRA); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (rejecting Board's interpretation of the NLRA); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202-04 (1986) (same); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317-318 (1965) (same). Here, *D.R. Horton I* was wrong for a basic reason: the NLRA does not provide employees a non-waivable right to invoke class procedures. The Board's decision to the contrary in *D.R. Horton I* thus exceeded the Board's authority to construe the Act. *See NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) (a Board decision must be rational and consistent with the Act and not an "unauthorized assumption . . . of major policy decisions properly made by Congress").

A. The decisions cited by *D.R. Horton I* do not suggest Section 7 grants employees a right to seek to have their claims adjudicated collectively.

D.R. Horton I did not find the NLRA expressly addresses the procedures by which employees may seek to have their employment-related claims adjudicated. Rather, *D.R. Horton I* reasoned that "the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation." *D.R. Horton I, supra*, slip op. at 2. However, *D.R. Horton I* fundamentally erred by failing to distinguish between employees' (i) collectively ***asserting*** they have certain legal rights in an attempt to obtain concessions concerning the terms and conditions of their employment and (ii) seeking and obtaining a collective ***adjudication*** of

their employment-related legal claims. While the NLRA may protect the former, it says nothing about the latter. The cases cited by *D.R. Horton I* show only that Section 7 protects employees from retaliation for concertedly asserting they have certain legal rights against their common employer with respect to the terms and conditions of their employment, not that employees have a right under the NLRA to seek a collective adjudication of their individual legal claims.

For example, in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Court noted some lower courts had applied the "mutual aid or protection" clause to protect employees from retaliation for "resort[ing] to administrative and judicial forums" in seeking to improve their working conditions. However, the Supreme Court *expressly reserved* the question of "what may constitute 'concerted' activities in this context." *Id.* at 566 n.15.

In addition, *Salt River Valley* makes clear that employees' Section 7 right to "resort to judicial forums" is correctly understood as a right to assert legal rights collectively, which is not the same thing as a right to invoke judicial or arbitral procedures for a collective adjudication of individual claims. In that case, a number of employees believed they were due back pay under the FLSA and grew dissatisfied when their union did not appear to be pursuing the issue. *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 863-64 (1952). The employees enlisted "the support of others in a movement to recover back pay and overtime wages." *Id.* at 863. To this end, Leo Sturdivant, one of the complaining employees, circulated a petition among his co-workers through which they designated him their agent "to take any and all actions necessary to recover for [them] said monies, whether by way of suit or negotiation, settlement and/or compromise" and authorized him to employ an attorney to represent them. *Id.* at 864. Both the union and the employer learned of the petition, both opposed it, and Sturdivant's employment was soon terminated.

Significantly, the employees' protected concerted activities in *Salt River Valley* in asserting their legal rights all occurred ***outside*** of any adjudicatory proceeding. That protected conduct involved employees attempting to exert group pressure on their employer and union to negotiate a settlement of their claims or, if necessary, pool their resources to finance litigation. ***The employees' protected concerted activities did not utilize or depend on any class litigation procedures.*** The employees collectively demanded their employer comply with the FLSA, which they believed granted them certain legal rights, regardless of whether any claims actually filed would be adjudicated collectively or individually.

The other decisions cited by *D.R. Horton I* similarly lack any hint that employees have a Section 7 right to seek a collective adjudication of their claims. Rather, those cases, like *Salt River Valley*, simply demonstrate the general proposition that employers may not retaliate against employees for concertedly asserting legal rights relating to the terms and conditions of their employment. *D.R. Horton I, supra*, slip op. at 2-3 & n.3.[5]

[5] *See Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (employer violated NLRA by discharging employee for filing petition jointly with co-worker); *Brad Snodgrass, Inc.*, 338 NLRB 917 (2003) (employer violated NLRA by laying off employees in retaliation for union's filing grievances on their behalf); *Le Madri Rest.*, 331 NLRB 269 (2000) (employer violated NLRA by discharging two employees who were named plaintiffs in lawsuit against employer); *Uforma/Shelby Bus. Forms*, 320 NLRB 71 (1985) (employer violated NLRA by eliminating third shift in retaliation for union's pursuit of a grievance); *United Parcel Serv., Inc.*, 252 NLRB 1015 (1980) (employer violated NLRA by discharging employee for initiating class action lawsuit, circulating petition among employees, and collecting money for retainer, among other activities); *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028 (1976) (employer violated NLRA by suspending employee without pay for submitting letter to management complaining on behalf of other employees about job assignments); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (alleging employer violated NLRA by discharging three employees who had filed suit against employer); *El Dorado Club*, 220 NLRB 886 (1975) (employer violated NLRA by discharging employee in retaliation for testifying at fellow employee's arbitration hearing); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (employer violated NLRA by discharging three union members for filing a lawsuit); *see also Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (noting in *dicta* that filing lawsuit concerning terms and conditions of employment was protected activity).

B. The constantly shifting positions of NLRB personnel in *D.R. Horton* demonstrate the lack of a substantive right.

The inconsistent and contradictory positions taken in *D.R. Horton* by the Regional Director, the Office of Appeals, the General Counsel, the ALJ, the Acting General Counsel, and the Board refute the Board's creation of a novel "right" under the NLRA to access class procedures.

Initially, the Regional Director partially dismissed the Charging Party's charge in *D.R. Horton* because "application of the class action mechanism is primarily a procedural device and the effect on Section 7 rights of prohibiting its use is not significant." (Regional Director's partial refusal to issue complaint on Michael Cuda's unfair labor practice charge, dated Aug. 28, 2008, Resp't Ex. 3 in D.R. Horton, Inc.'s Record Excerpts, *D.R Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (No. 12-60031).) On the Charging Party's appeal of that decision, the Office of Appeals took a different position, affirming denial of the charge with respect to class arbitrations but concluding D.R Horton's arbitration agreement "could be read as precluding employees from joining together to challenge the validity of the waiver by filing a class action lawsuit." (Office of Appeals' ruling on Michael Cuda's appeal from Regional Director's partial refusal to issue complaint, dated June 16, 2010, Resp't Ex. 2 in D.R. Horton, Inc.'s Record Excerpts, *D.R Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (No. 12-60031).) This ruling was consistent with the NLRB General Counsel's Memorandum GC 10-06 ("the GC Memo") issued that same day. *See* GC Memo at 7[6] (employees may waive all rights to file class arbitration and litigation, if they can concertedly challenge the enforceability of the agreement containing the waiver without retaliation).

[6] Available at http://www.nlrb.gov/publications/general-counsel-memos.

The ALJ ruled in *D.R. Horton* that he was "not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims." *D.R. Horton I, supra*, slip op. at 16. He therefore held that D.R. Horton's class action waiver in its arbitration agreement did ***not*** violate the NLRA.

The Acting General Counsel's exceptions to the ALJ's decision and related briefs to the Board were also consistent with the GC Memo. Indeed, the Acting General Counsel initially argued "***an employer has the right to limit arbitration to individual claims*** – as long as it is clear that there will be no retaliation for concertedly challenging the agreement." (Acting General Counsel's Reply Brief to Respondent's Answering Brief at 1-2, dated April 25, 2011, *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (No. 12-CA-025764)[7] (emphasis added).)

Finally, the Board in *D.R. Horton I* – diverging from the Regional Director's partial dismissal of the underlying charge, the Office of Appeals' ruling partially sustaining that dismissal, the GC Memo, the ALJ's decision, and the Acting General Counsel's arguments in his briefs – held the arbitration agreement violated the NLRA because it required employees to waive class procedures "in any forum, arbitral or judicial." *D.R. Horton I, supra*, slip op. at 1. The varying positions taken by NLRB personnel show there was no precedent for holding employees have a right under the NLRA to seek to have their legal claims adjudicated collectively.

C. A right to access class action procedures is not rational and consistent with the NLRA because the NLRA cannot mandate certification of a class action.

D.R. Horton I correctly recognized that under the Federal Rules, a court may deny an employee's motion for class certification irrespective of the NLRA. The Board conceded that Section 7 cannot grant employees a "right to class certification." *D.R. Horton I, supra*, slip op.

[7] Available at http://apps.nlrb.gov/link/document.aspx/09031d458047d3c0.

at 10. Consequently, *D.R. Horton I* held that Section 7 can only guarantee employees a more limited right: "to take the collective action inherent in ***seeking*** class certification, whether or not they are ultimately successful under Rule 23" and "to act concertedly by ***invoking*** Rule 23, Section 216(b), or other legal procedures." (*Id.* (emphasis added).) *D.R. Horton* did not explain what this odd alleged right—to concertedly "seek" class certification and "invoke" class procedures irrespective of whether class certification is granted—means, or what purpose such a right allegedly serves under the NLRA or any other law.

This Section 7 right as characterized by *D.R. Horton I* is not rational or consistent with the Act, among other reasons, because the alleged right is illogical and its application is arbitrary. *D.R. Horton I* observed that an employer may oppose employees' motions for class certification without violating employees' Section 7 rights. *Id.* at 10 n.24. *D.R. Horton I* apparently reached this conclusion because, even if class certification is denied as a result of an employer's opposition, employees already exercised their Section 7 right to concertedly "seek" class certification and "invoke" Rule 23 or similar procedures prior to that denial.

D.R. Horton thus holds that employees can exercise their alleged Section 7 right to seek class certification even if certification fails, ***unless*** certification fails based on a class waiver. But *D.R. Horton I* never explains why the reason for the denial of class certification matters under the NLRA. *D.R. Horton I* does not, and cannot, rationally explain why an employee's failure to obtain class certification—which according to *D.R. Horton I* is not guaranteed by the NLRA—becomes an NLRA violation if the failure is based on a class action waiver but does not constitute an NLRA violation if the failure is based on an employer's opposition to class certification on other procedural or substantive grounds. The reason for the denial of class certification should be irrelevant if the Section 7 right at issue is simply the right to concertedly ***seek*** class certification and ***invoke*** Rule 23 or similar rules.

Considering *D.R. Horton I*'s characterization of the alleged Section 7 right at issue, a class action waiver would not abridge a purported right to concertedly "seek" class certification and "invoke" Rule 23 procedures any more than an employer's filing an opposition to an employee's motion for class certification. An arbitration agreement waiving class procedures does not, and cannot, prevent employees from concertedly filing a class action lawsuit, "seeking" class certification, and "invoking" Rule 23. An employer may respond to such a purported class or collective action lawsuit by moving to stay the action and compel individualized arbitration, as Hobby Lobby did. But under *D.R. Horton*'s characterization of the right at issue, there is no rational difference for Section 7 purposes between an employer's responding to a class action lawsuit with a successful motion to compel individualized arbitration and its responding with a successful opposition to class certification. In ***both*** instances, by the time the employer files its court document, the employee(s) ***already will have taken*** "the collective action inherent in seeking class certification" and ***already acted*** concertedly by "invoking" class certification procedures.

Indeed, the facts of this case show Hobby Lobby's employees ***did*** invoke collective and class action procedures by filing representative and putative class action complaints in federal courts irrespective of their MAAs. (ALJD p. 6.) According to *D.R. Horton I*'s characterization of the Section 7 right, these employees fully exercised their Section 7 rights prior to and irrespective of Hobby Lobby's later motions to compel individual arbitration.

In short, *D.R. Horton I*'s analysis is illogical and arbitrary.

D. *D.R. Horton I*'s holding that employees have a right to class procedures was not a permissible interpretation of Section 7.

In *D.R. Horton I*, the Board also exceeded its authority by purporting to grant employees non-waivable substantive rights to procedures that are not created by the NLRA but rather by other legal authorities outside of the Board's authority for other purposes.

1. *D.R. Horton I* conflicts with the Rules Enabling Act.

D.R. Horton I is at odds with the Rules Enabling Act ("REA"), in which Congress delegated authority to the Supreme Court to promulgate the Federal Rules of Civil Procedure. 28 U.S.C. § 2072(b). The REA expressly provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right." *Id.*

In light of the REA's restriction, the Supreme Court has made clear that Rule 20 (permissive joinder) and Rule 23 (class actions) regulate only procedure and do not impact substantive rights. In *Shady Grove Orthopedic Associates v. Allstate Insurance, Co.*, a plurality of the Supreme Court explained that a rule of procedure is valid under the REA only if it "really regulat[es] procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." 130 S.Ct. 1431, 1442, 176 L.Ed.2d 311 (2010) (internal quotation marks and citation omitted). Regarding the validity under the REA of the Federal Rules' various joinder mechanisms, the plurality opinion reasoned:

> Applying that criterion, we think it obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid [under the REA]. *See, e.g.*, Fed. Rules Civ. Proc. 18 (joinder of claims), 20 (joinder of parties), 42(a) (consolidation of actions). Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23 – at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action – falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), *merely enables a federal court to adjudicate claims of multiple parties at once, instead of in*

> *separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.*

Id. at 1443 (emphasis added).

In *D.R. Horton I*, contrary to the principle that the Federal Rules are valid only insofar as they "really regulat[e] procedure," the Board held employees possess a *substantive* right under the NLRA to class action procedures. *D.R. Horton I*, *supra*, slip op. at 10 ("Any contention that the Section 7 right to bring a class or collective action is merely 'procedural' must fail."). However, since the NLRA does not create class action procedures, employees could not have any purported right to bring a class action in federal court *but for* Rule 23 of the Federal Rules. *D.R. Horton I*'s holding thus treats Rule 23 as expanding employee's rights under Section 7 to engage in protected concerted activity. Consequently, the Board's interpretation conflicts with the REA by construing the Federal Rules as enlarging employees' substantive rights.[8]

2. *D.R. Horton I* conflicts with the Federal Rules and other procedures.

D.R. Horton I also is at odds with courts' interpretation of Rule 23, the Federal Rules generally, and other standards governing procedures for adjudication. Courts have held repeatedly and expressly that litigants do not have a substantive right to class action procedures under Rule 23 and such procedures are waivable. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002) ("A class

[8] *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845, 119 S.Ct. 2295, 2314 (1999) ("[N]o reading of the Rule can ignore the [REA's] mandate . . . ."). Moreover, to the extent the Board concluded employees possess a substantive right under the NLRA to class action and joinder procedures created under *state* law, the Board's interpretation impermissibly treated state law as modifying and enlarging substantive rights under a federal statute. *See, e.g.*, *Shady Grove*, 130 S.Ct. at 1443 ("[O]f course New York has no power to alter substantive rights and duties created by other sovereigns.")

action is merely a procedural device; it does not create new substantive rights."), *rev'd on other grounds, Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004). State class action procedures are treated similarly. *See, e.g.*, *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) (holding there is no "substantive right to pursue a class action, in either Texas state or federal court"). *D.R. Horton I* disregarded this substantial body of precedent interpreting rules and statutes outside the Board's jurisdiction and expertise.

Additionally, *D.R. Horton I*'s treating procedures as non-negotiable was inconsistent with courts' and litigants' practices under the Federal Rules. Those rules (and their state counterparts) generally permit, and sometimes mandate, that litigants negotiate regarding the procedures governing the adjudication of their disputes. *E.g.*, Fed. R. Civ. P. Rules 16(b) & (c) and 26(f) (allowing parties to agree on procedures governing case); 29 (allowing parties to stipulate to changes in discovery procedures); 37(a)(1) (requiring parties to attempt to agree on resolution to discovery disputes before seeking court action).

Parties in litigation frequently negotiate, and courts routinely enforce, agreements regarding class procedures, including agreed scheduling orders setting deadlines for motions for certification or permissive joinder; agreements extending the time in which employees may move for certification; stipulations as to the scope of any certified class; agreements by the parties as to the time period during which opt-ins in FLSA collective actions may file their consents to join a case or during which putative members of Rule 23 classes may file their notices to opt out; and stipulations and settlement agreements dismissing class allegations on agreed terms. Under *D.R. Horton I*'s novel rule granting employees substantive, non-waivable rights to class procedures, such routine agreements would be invalid because they narrow or waive employees' purported non-negotiable NLRA rights.

Indeed, *D.R. Horton I* holds employees have not only a substantive right under the NLRA to invoke class action procedures but also suggests employees are entitled to have their motions for certification ***decided on their merits according to Rule 23's requirements.*** *D.R. Horton I, supra*, slip op. at 10 & n.24; *see also Murphy Oil, supra*, slip op. at 5 n.30. Any such right would apparently prohibit employers from opposing an individual employee's class action complaint with a Rule 12(b) motion or a wide variety of procedural and substantive defenses unrelated to the requirements of Rule 23 and limit courts' ability to rule on such issues. For instance, some local rules require that motions for class certification be filed within 90 days of a class action complaint. *E.g.*, N.D. Ohio L.R. 23.1(c); C.D. Cal. L.R. 23-3; S.D. Ga. L.R. 23.2. Courts may deny certification motions for failing to comply with such rules. *E.g., Walton v. Eaton Corp.*, 563 F.2d 66, 75 n.11 (3d Cir. 1977) (district court did not abuse discretion in denying motion for certification as untimely); *Batson v. Powell,* 912 F. Supp. 565, 570-71 (D. Del. 1996) (denying motion for certification as untimely). However, if employees have a substantive right to have certification motions decided on their merits, these local rules would be invalid.

Murphy Oil I further states the Board's concern is "with employer-imposed restraints that would preclude employees from seeking to use [group litigation] mechanisms." *Murphy Oil I, supra*, slip op. at 17. Under the logic of *D.R. Horton I* and *Murphy Oil I*, an employer that makes an offer of judgment for the purpose of mooting the claims of a putative class or collective action plaintiff before he or she moves for class/collective action certification—thereby creating an employer-imposed restraint on group litigation mechanisms—would be engaging in an unfair labor practice under the NLRA. That is not and cannot be the law. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. ___, 133 S. Ct. 1523 (2013) (holding that single

employee's putative collective action under the FLSA became moot as a result of the employer's offer of judgment).

Finally, *D.R. Horton I*'s decision is contrary to Supreme Court and other case law holding parties are generally free, as a matter of contract, to agree to the procedures that will govern their arbitrations. *E.g.*, *Volt Info. Sciences, Inc.*, 489 U.S. at 479; *Baravati*, 28 F.3d at 709.

3. *D.R. Horton I* conflicts with the FLSA.

D.R. Horton I also conflicts with the FLSA's collective action procedures. Courts regularly hold those procedures, like Rule 23's class action procedures, do not provide substantive rights and are waivable.[9]

In concluding employers and employees are not permitted to agree to arbitrate FLSA claims individually, *D.R. Horton I* failed to consider that individual arbitration is fully consistent with the purposes underlying § 216(b)'s current structure. 29 U.S.C. § 216(b). Congress adopted the Portal-to-Portal Act in 1947 to amend the FLSA to limit the number of collective actions filed and require every employee who participates in such actions to give his or her

[9] *See Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 350–51 (4th Cir. 2008); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir.2004) (holding that arbitration agreement was not unenforceable under the FAA where it required employees to arbitrate their FLSA claims individually because "the inability to proceed collectively" did not "deprive[] them of substantive rights available under the FLSA."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Horenstein v. Mortg. Mkt., Inc.*, 9 Fed.Appx. 618, 619 (9th Cir. 2001); *Copello v. Boehringer Ingelheim Pharmaceuticals Inc.*, 812 F.Supp.2d 886, 894 (N.D. Ill. 2011) ("[W]hile FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the procedural right to join a collective action."); *Damassia v. Duane Reade, Inc*., 250 F.R.D. 152, 164-65 (S.D.N.Y. 2008) (holding that the opt-in procedures of FLSA are procedural, not substantive); *Sjoblom v. Charter Communications, LLC*, 2007 WL 4560541, at *5-6 (W.D. Wis. Dec. 19, 2007) (concluding that the opt-in provisions of § 216(b) are not clearly substantive); *Westerfield v. Washington Mutual Bank*, 2007 WL 2162989, at *1 (E.D.N.Y. July 26, 2007) ("Section 216(b) by its terms governs procedural rights.").

individual consent to be a party-plaintiff. *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (observing that Congress enacted §216(b) "for the purpose of *limiting private FLSA plaintiffs to employees who asserted claims in their own right* and freeing employers of the burden of representative actions" (emphasis added)). There is no rational basis for finding that an arbitration agreement waiving class procedures interferes with employees' purported right to engage in concerted activity any more than does the FLSA's own individual opt-in requirement. *D.R. Horton I, supra*, slip op. at 3 & n.5.

D.R. Horton I also entirely failed to discuss the procedures that govern collective actions under the FLSA (and, by incorporation, the ADEA). The FLSA does not establish any procedures for identifying and notifying putative collective action members of their opportunity to opt-in to an FLSA collective action. Rather, such procedures have been developed by courts through their inherent authority to manage their cases. *Hoffmann-La Roche, Inc.*, 493 U.S. at 165. The various ad hoc procedures for "certifying" a § 216 collective action have thus been developed by federal courts applying their discretionary authority.[10] *D.R. Horton I* holds that employees have a substantive right under the NLRA to invoke these ad hoc procedures without explanation. The NLRA cannot reasonably be construed to provide employees a substantive right to invoke notification and certification procedures developed by courts in the exercise of judicial discretion.

E. *D.R. Horton I*'s construction of Section 7 was unreasonable.

Even if the Board had some authority under the NLRA to define Section 7 rights as guaranteeing employees' access to adjudicatory procedures (which it does not), *D.R. Horton I*'s

[10] *See, e.g.*, *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1212-16 (5th Cir. 1995) (describing various methods used by district courts to determine whether employees are similarly situated in a collective action under the ADEA, which incorporates § 216(b)), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90-91 (2003).

holding that employees have a non-waivable right to invoke class procedures was an unreasonable construction of Section 7. "[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). *D.R. Horton I* completely failed to consider the purposes and functions of class procedures generally, the means available to employees to pursue their claims effectively on an individual basis, and employers and employees' legitimate interests in agreeing to individualized arbitration.

1. *D.R. Horton I* unreasonably assumed class-action procedures are necessary to serve employees' interests under the NLRA.

D.R. Horton I treated class action procedures as necessary to employees' interests under the NLRA. It reasoned that "[e]mployees are both more likely to assert their legal rights and also more likely to do so effectively if they can do so collectively." *D.R. Horton I, supra,* slip op. at 3.[11] It also claimed that "[e]mployees surely understand . . . that named plaintiffs run a greater risk of suffering unlawful retaliation than unnamed class members" and "in a quite literal sense, named-employee-plaintiffs protect the unnamed class members." *D.R. Horton I, supra*, slip op. at 3 n.5. However, *D.R. Horton I*'s assumptions are unfounded.

a. *D.R. Horton I* ignored the intended purposes and functions of class procedures.

In holding that the NLRA grants employees a non-waivable right to class procedures, *D.R. Horton I* never considered the purposes of class action procedures. Such procedures serve to allow courts to balance the interests of judicial efficiency with the demands of due process in adjudicating claims common to multiple litigants. 1 MCLAUGHLIN ON CLASS ACTIONS §1:1 (8th

[11] *D.R. Horton I* did not identify any evidence to support this proposition, and it cited a single decision, *Special Touch Home Care Services*, 357 NLRB No. 2 (2011). However, that case concerned potential retaliation against employees who intended to participate in a strike against their employer, not file a class action lawsuit.

ed.) (explaining class actions are "a mechanism for a single, binding adjudication of multiple claimants' rights, while assuring due process to absent class members and repose to defendants"). *D.R. Horton I*, however, viewed such procedures solely as a potential "weapon" for employees to exert group pressure on employers. *See D.R. Horton I*, *supra*, slip op. at 2 n.3 (noting that concerted protected activity "is often an effective weapon for obtaining that to which the participants, as individuals, are already 'legally' entitled" (quoting *Salt River*, 206 F.2d at 328)). The Board in *D.R. Horton I* did not point to any basis in the NLRA, the Federal Rules, or precedent for its novel presumption that class action procedures exist to serve substantive concerns under the NLRA and therefore cannot be waived under the NLRA regardless of the intended purposes of those procedures. *See Amchem Prods.*, 521 U.S. at 613-15 (current class action procedures originated only in 1966).

b. *D.R. Horton I* ignored the negligible role class procedures play under the NLRA.

D.R. Horton I failed to demonstrate that class action procedures, in practice, serve the NLRA's purposes. The core purpose of Section 7's right to engage in concerted activity is to allow employees, if they so choose, to join together in an attempt to increase their bargaining power over the terms of their employment. *See NLRB. v. City Disposal Systems Inc.*, 465 U.S. 822, 835, 104 S.Ct. 1505, 1513 (1984) ("[I]n enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.") Contrary to *D.R. Horton I*'s speculation, class procedures are not necessary to serve that purpose.

As an initial matter, *D.R. Horton I* failed to give weight to the fact that for the first three decades of the NLRA's existence, the modern class action procedure did not even exist in federal

courts. The Federal Rules of Civil Procedure were first adopted in 1938, three years after enactment of the NLRA in 1935. Under the 1938 version of Rule 23, parties were granted a means to pursue a "spurious" class action to litigate common questions of law or fact. *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 545-547, 94 S. Ct. 756, 762-763 (1974). However, all class members in a "spurious" class action had to affirmatively and individually opt into the class. *See id*. Therefore, even then, "named-employee-plaintiffs" could not "protect the unnamed class members," as *D.R. Horton I* assumes. Not until 1966 did Rule 23 allow for modern class actions involving absent, unnamed class members and employing "opt out" procedures. *See Anchem Products, Inc. v. Windsor*, 521 U.S. 591, 615, 117 S.Ct. 2231 (1997). However, even now, members of FLSA, ADEA, and Equal Pay Act collective actions, which are not subject to Rule 23, still must file an individual consent with the court to join any putative collective action and thus still cannot gain any "anonymity" in pursuing claims against their employers as part of a collective action. *See* 29 U.S.C. § 216(b); 29 U.S.C. § 626(b).

In addition, *D.R. Horton I* failed to consider that class action procedures are rarely suitable for litigation over the bargained-for terms of non-unionized employees' employment. Class certification is routinely denied with respect to breach of contract and similar claims by at-will employees because such claims are inherently individualized. For example, in *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009), the Eleventh Circuit reversed an order granting class certification noting the plaintiff could "not utilize identical evidence on behalf of every member of the class to prove offer, acceptance, consideration, or the essential terms." The court explained:

> Instead, these mandatory elements of each class member's claim depend on such individualized facts and circumstances as when a given employee was hired, what the employee was told (and agreed to) with respect to compensation rules and procedures at the time of hiring, the employee's subjective understanding of how he would be compensated and the circumstances under which his compensation

> might be subject to charge backs, and when and how any pertinent part of the employee's compensation agreement or understanding thereof may have changed during the course of that employee's tenure at T-Mobile.

Id. Indeed, courts regularly hold contract claims by employees who are not subject to a collective bargaining agreement are not suitable for class and collective action treatment.[12] Thus class action litigation does not serve the NLRA's core concern of bargaining between employers and employees over the terms of employment.

D.R. Horton I also failed to acknowledge that most employment claims amenable to class treatment involve fixed, ***statutory*** rights, not obligations dependent on employees' individual or collective bargaining power. *See, e.g.*, 42 U.S.C. § 2000e–2 (prohibited practices under Title VII); 42 U.S.C. § 12112 (prohibited practices under the ADA); 29 U.S.C. § 215 (prohibited acts under FLSA); 29 U.S.C. § 623 (prohibited practices under the ADEA). Such statutes mandate certain terms and conditions of employment as a matter of law. These same employment statutes almost universally contain anti-retaliation provisions and one-way fee-shifting provisions to permit employees to pursue their claims effectively on an individual basis. *See, e.g.*, 42 U.S.C. §

[12] *See also Cutler v. Wal-Mart Stores, Inc.*, 927 A.2d 1, 10 (Md. Ct. Spec. App. 2007) (affirming denial of class certification in missed-breaks case, in part, because "absent a contract applicable to the entire class of Wal-Mart employees, the existence, formation, and terms of any implied employment contract would vary among employees" and "the alleged breaches of these implied contracts by supervisors and managers at individual Wal-Mart stores also give rise to individual, not common, factual and legal issues"); *Wal-Mart v. Lopez*, 93 S.W.3d 548, 557 (Tx. Ct. App. 2002) (reversing trial court's certification of class action as abuse of discretion in missed-breaks case because, among other things, "[a]ny determination concerning a 'meeting of the minds' [on a breach of oral contract claim] necessarily requires an individual inquiry into what each class member, as well as the Wal-Mart employee who allegedly made the offer, said and did"); *Cohn v. Massachusetts Mut. Life Ins. Co.*, 189 F.R.D. 209, 215 (D. Conn. 1999) (no predominance where the resolution of plaintiffs' breach of contract claims was dependent upon the representations made to each plaintiff individually); *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 57 (S.D. Fla. 1990) (finding that commonality was not met where "[i]t [was] not only conceivable, but probable, that [the] court [would] be required to hear evidence regarding the existence, terms, modifications and limitations of each alleged contract of the over 5,000 prospective class members").

2000e-3(a) (Title VII anti-retaliation provisions); 42 U.S.C. § 12203 (ADA anti-retaliation provisions); 29 U.S.C. § 215(a)(3) (FLSA anti-retaliation provisions); *see also* 42 U.S.C. § 2000e–5(k) (in a Title VII case, "the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee (including expert fees) as part of the costs"); 42 U.S.C. § 12205 ("the court ..., in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs" in an ADA case); 29 U.S.C. § 216(b) (in a FLSA case, the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."). Such anti-retaliation and fee-shifting provisions adequately protect employees and give sufficient incentive to employees (and their counsel) to pursue their claims individually. *Compare D.R. Horton I, supra,* slip op. at 3 & n.5 *with Holling Press, Inc.*, 343 NLRB 301, 303 n.15 (2004) (employee allegedly terminated for pursuing a sexual harassment claim could seek protection under the anti-retaliation provisions of anti-discrimination statute even though her conduct was not protected under the NLRA).

D.R. Horton I also failed to consider that in practice, employees pursue statutory employment claims on an individual basis with great frequency. For example, in 2011, there were 6,180 private FLSA lawsuits filed in federal court, a large percentage of which were individual suits, and 99,947 individual charge filings with the EEOC. *See* Judicial Bus. Of the U.S. Courts 2011, Table C-2 at 127.[13] Moreover, the EEOC, the DOL, and other federal and state agencies remain empowered to pursue class or collective actions on behalf of employees in appropriate cases, irrespective of employees' arbitration agreements waiving such procedures. *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) (noting "a

[13] Available at: http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

promising alternative to class action treatment" is "to complain to the Department of Labor, which . . . can obtain in a suit under the [FLSA] the same monetary relief for the class members that they could obtain in a class action suit were one feasible").

Finally, to the extent there is such a thing as "concerted legal activity," *D.R. Horton I* wrongly equated it with class action, collective action, and joinder procedures. *D.R. Horton I*, *supra*, slip op. at 10. However, there are many ways in which employees may act concertedly in asserting legal claims that do not depend on, and have nothing to do with, collective adjudication procedures.

For example, irrespective of individual arbitration agreements, employees can work together in asserting their common legal rights by pooling their finances, making settlement demands and negotiating as a group, sharing information, and seeking safety in numbers. In addition, irrespective of individual arbitration agreements, employees can solicit other employees to assert the same alleged legal rights, act in concert to initiate multiple individual arbitrations alleging the same legal claims, and coordinate the litigation of those claims by obtaining common representation, jointly investigating their claims, and developing common legal theories and strategies. Irrespective of individual arbitration agreements, employees can testify on behalf of one another in their arbitration proceedings and provide affidavits in those proceedings. In short, individual arbitration agreements permit employees to do everything they can to lend one another "mutual aid and protection" in asserting their alleged legal rights against their employer. *Cf.* Kenneth T. Lopatka, "A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws," 63 S.C. L. Rev. 43, 92 (Autumn 2011) ("[A]n agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only

the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits.").

c. *D.R. Horton I* unreasonably concluded employees cannot waive access to class procedures under the NLRA.

In addition, the Supreme Court has already held that unions may waive Section 7 rights pursuant to collective bargaining agreements, including the right to strike and an individual employee's right to a judicial forum. The effect of D.R. Horton I is that a union can waive an individual's rights, ***but that same individual cannot do so***. This is illogical under contract law principles and contrary to *14 Penn Plaza,* which found "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *14 Penn Plaza LLC,* 556 U.S. at 258. Whatever employees' right might be under the NLRA to access class procedures, there is no reasonable basis to prohibit employees from agreeing to waive such access as one component of a legitimate, good-faith arbitration agreement.

2. *D.R. Horton I* failed to consider the parties' substantial interests in utilizing individualized arbitration.

D.R. Horton I also ignored the substantial interests weighing *in favor* of individual employment arbitration and failed to recognize the harm that its holding might do to those interests

D.R. Horton I did not acknowledge that individualized arbitration provides benefits to both parties – the employer and the employee – by providing a relatively low-cost and quick method of adjudicating disputes. *E.g.*, *Stolt-Nielsen*, 559 U.S. at 685 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."). The Supreme Court has recognized

that class arbitration is antithetical to the advantages parties expect when they agree to arbitrate and impairs the use of arbitration to achieve efficiency, confidentiality, and informality. *Concepcion*, 131 S. Ct. at 1751 ("[C]lass arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.").

Indeed, the Supreme Court has expressly recognized the benefits of arbitration in employment disputes.

> Furthermore, for parties to employment contracts not involving the specific exempted categories set forth in § 1, . . . there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship, and the necessity of bifurcation of proceedings in those cases where state law precludes arbitration of certain types of employment claims but not others. The considerable complexity and uncertainty that the construction of § 1 urged by respondent would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and "breeding litigation from a statute that seeks to avoid it." The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in Gilmer, " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'"

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122-23 (2001) (internal citations omitted).

As potential defendants, employers have additional legitimate interests in agreeing to individual arbitration that *D.R. Horton I* failed to acknowledge and consider. An employee's filing a class action may impose significant costs and burdens on an employer, for example, by

placing it under a duty to identify, collect, and preserve potentially relevant evidence relating to an entire putative class. Such duties may arise without certification ever being granted. *See, e.g., Pippins v. KPMG LLP*, 2011 WL 4701849, at *3 & 6 (S.D.N.Y. Oct. 7, 2011) (employer incurred over $1.5 million to preserve putative class members' hard drives prior to any certification decision). In addition, courts and commentators have recognized that if a class action is certified, it may impose such substantial defense costs and risks on a defendant that it is forced to settle irrespective of the merits of the underlying claims. Indeed, the Federal Rules were amended in 1998 to allow interlocutory appeals from class certification decisions, in part because "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *See* Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendments). *See also Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 677-78 (7th Cir. 2009) (recognizing the "*in terrorem* character of a class action" and explaining that "[w]hen the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good").

Such problems are even more acute for employers with respect to FLSA collective actions, because employees may easily obtain conditional certification due to the very low burden imposed on plaintiffs. *See, e.g.*, *Williams v. Bally's Louisiana, Inc.*, Civil Action No. 05-5020, 2006 WL 1235904, at *2 (E.D. La. 2006) (explaining courts "require nothing more than substantial allegations" in support of a motion for conditional certification under the FLSA and therefore conditional certification "is typically granted"). In addition, an employer generally may not obtain interlocutory review of a conditional certification decision because it is not considered final and is not subject to Rule 23(f). *See, e.g.*, *Baldridge v. SBC Communications,*

Inc., 404 F.3d 930 (5th Cir. 2005) (rejecting interlocutory appeal from decision conditionally certifying collective action under § 216(b) because it was not a final order).

Finally, the Supreme Court has recognized class actions in an arbitral forum pose even greater risks to defendants due to the more limited procedures in arbitration. *See Concepcion*, 131 S.Ct. at 1752 (explaining that "class arbitration greatly increases risks to defendants" due to the absence of multilayered review" and that "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims").

Employers thus have a legitimate interest in agreeing to procedures – such as individualized arbitration – allowing the parties to obtain an adjudication of the employee's claim on its merits while also avoiding substantial costs and risks unrelated to the strength of that claim. *D.R. Horton I* makes no mention of any of these valid concerns and legitimate interests underlying the use of individual arbitration agreements.

3. *D.R. Horton I's* assertion that its decision would have a narrow impact was unreasonable and wrong.

D.R. Horton I also unreasonably underestimated the scope and significance of its decision mandating that NLRA-covered employees have access to class action procedures in some forum.

First, *D.R. Horton I* suggested the size of a class in employment disputes would be relatively small, unlike class actions involving commercial claims. *D.R. Horton I, supra,* slip op. at 11-12. (suggesting the average employment-related class and collective actions would involve only 20 members). That was simply untrue. Class-wide employment litigation can involve thousands of putative participants, especially in FLSA conditionally certified collective actions. *See, e.g., Rindfleisch v. Gentiva Health Servs., Inc.*, 17 Wage & Hour Cas.2d (BNA) 1081, 1084 (N.D. Ga. Apr. 13, 2011) (conditionally certifying FLSA collective action of up to 10,000 employees).

D.R. Horton I also wrongly reasoned that its decision implicates "[o]nly a small percentage of arbitration agreements." *D.R. Horton I, supra,* slip op. at 12. In fact, *D.R. Horton I* impacts a large percentage of the workforce – every employee covered by the NLRA and not subject to a collective bargaining agreement – by deeming those employees to possess a non-waivable, substantive right under the NLRA to access certain procedures in litigating their employment claims. Indeed, *D.R. Horton I* and its Board progeny threaten to destroy arbitration as an effective tool for achieving relatively quick and inexpensive adjudications of employment claims.

D.R. Horton I's construction of Section 7 was therefore unreasonable and beyond the Board's authority. *See Murphy Oil II,* 2015 WL 6457613, at *2 (confirming that under *D.R. Horton II*, "'use of class action procedures . . . is not a substantive right' under Section 7 of the NLRA"). For all of the reasons set forth above, *D.R. Horton I* should be overturned in the first instance because the NLRA does not grant employees a non-waivable right to invoke class action, collective action, or joinder procedures in pursuing an adjudication of their employment-related legal claims.

III. The FAA mandates that individual employment arbitration agreements be enforced.

In addition to the fact the NLRA does not provide employees a right to class procedures, *D.R. Horton I* should also be overturned because the FAA requires that agreements like the MAA be enforced. (ALJD p. 8 (refusing to consider whether *D.R. Horton I* and *Murphy Oil* were wrongly decided).) The FAA provides such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The statute reflects an "emphatic federal policy in favor of arbitral dispute resolution." *KPMG LLP v. Cocchi*, 565 U.S. ___, 132 S. Ct. 23, 25 (2011). The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements

according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748.

Under the FAA, parties are generally free, as a matter of contract, to agree to the procedures governing their arbitrations. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (parties to an arbitration may "specify by contract the rules under which that arbitration will be conducted"); *Baravati v. Josephthal, Lyon & Ross, Inc*., 28 F.3d 704, 709 (7th Cir. 1994) ("Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.").

Pursuant to Section 2 of the FAA, a court may deem an arbitration agreement invalid only on grounds as exist "for the revocation of any contract," such as "fraud, duress, or unconscionability." *Concepcion*, 131 S. Ct. at 1746. For instance, complaints about the "[m]ere inequality in bargaining power" between an employer and employee are insufficient to void an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). Similarly, the Supreme Court repeatedly has rejected challenges to the "adequacy of arbitration procedures," concluding such attacks are "out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* at 30. A party to an arbitration agreement "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 31 (citation omitted). Thus, an arbitration agreement is enforceable even if it permits less discovery than in federal courts, and even if a resulting arbitration ***cannot "go forward as a class action or class relief [cannot] be granted by the arbitrator."*** *Id.* at 31-33 (internal quotations and citation omitted) (emphasis added).

In short, state and federal courts "must enforce the [FAA] with respect to all arbitration agreements covered by that statute." *Marmet Health Care Ctr. v. Brown*, 565 U.S. ___, 132 S.

Ct. 1201, 1202 (2012) (per curiam). "That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. ___, 132 S. Ct. 665, 669 (2012) (citation omitted).

Applying these principles, numerous courts have enforced mandatory employment arbitration agreements containing class action waivers under the FAA. *See Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *see also Vilches v. The Travelers Cos., Inc.*, 413 F. App'x 487, 494 & n.4 (3d Cir. 2011) (class action waiver was not unconscionable); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (same); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001) ("Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute.").

A. Both before and after *D.R. Horton I*, courts consistently enforce arbitration agreements containing class action waivers.

The MAA's provisions are ordinary and unexceptional. Numerous courts – including at least four Courts of Appeals – have enforced mandatory employment arbitration agreements containing class action waivers under the FAA while explicitly declining to follow the Board's holding in *D.R. Horton I*. *See D.R. Horton II*, *supra*, 737 F.3d at 362 ("The NLRA should not be understood to contain a congressional command overriding application of the FAA."); *Murphy Oil USA, Inc. v. NLRB*, --- F.3d ----, 2015 WL 6457613 (5th Cir. Oct. 26, 2015) ("[A]n employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration."); *Owen v. Bristol Care, Inc.*, 702 F.3d

1050, 1055 (8th Cir. 2013) (rejecting plaintiff's "invitation to follow the NLRB's rationale in *D.R. Horton*" and enforcing arbitration agreement containing class action waiver); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2nd Cir. 2013) (declining to follow the Board's decision in *D.R. Horton*); *see also Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (observing that federal courts "have determined that they should not defer to the NLRB's decision in *D.R. Horton* on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act.")

District courts continue to enforce such agreements in spite of the panel's decision, which they view as contrary to the FAA and precedent. *See Murphy Oil II*, *supra*, slip op. at 36 n.5 (Johnson, dissenting) (collecting citations to dozens of Federal and state courts rejecting *D.R. Horton I*).

The Board should defer to this extensive and nearly universal interpretation of the FAA, which is outside of its jurisdiction and expertise.

B. *D.R. Horton I* violates the FAA.

Despite the extensive case law to the contrary, *D.R. Horton I* ruled that an employment arbitration agreement was unenforceable because it prohibited class procedures. *(D.R. Horton I, supra*, slip op. at 1.) To reach that unprecedented result, *D.R. Horton I* reasoned employees' right to engage in protected concerted activity includes the "right" to bring a class or collective action. (*Id.* at 2-4.) The Board should now recognize that *D.R. Horton I*'s interpretation of the FAA was fundamentally flawed.

1. *D.R. Horton I* conflicts with *Concepcion*.

D.R. Horton I wrongly concluded its ban on class action waivers is allowable under the FAA because the ban is not limited to arbitration agreements. (*Id.* at 9.) The panel thus believed

its rule did not treat arbitration agreements "less favorably than other private contracts" in violation of the FAA. (*Id.*)

In *Concepcion*, the Supreme Court expressly rejected the same attempt to circumvent the FAA and struck down a nearly identical California rule prohibiting class action waivers. *Concepcion*, 131 S. Ct. at 1746-48. *Concepcion* recognized that courts could exhibit hostility to arbitration agreements by announcing facially neutral rules ostensibly applicable to all contracts. *Id.* at 1747. For instance, a court might find unconscionable all agreements that fail to provide for "judicially monitored discovery." *Id.* "In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well." *Id.* To avoid this result, the Supreme Court concluded the permissible grounds for invalidating arbitration agreements under Section 2 of the FAA may not include a "preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" *Id.* at 1748 (citation omitted).

Therefore, a rule used to void an arbitration agreement is not saved under Section 2 of the FAA simply because it would apply to "any contract." The proper test is whether a facially neutral rule prefers procedures that are incompatible with arbitration and thus "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.*

Applying this test, the *Concepcion* Court held a rule mandating the availability of class procedures is incompatible with arbitration. *Id.* at 1750–52. Arbitration is intended to be less formal than court proceedings to allow for the speedy and inexpensive resolution of disputes. *Id.* at 1751. Such informality makes arbitration poorly suited to conducting class litigation with its heightened complexity, due process issues, and stakes. *Id.* at 1751–52. The Court held:

> The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with

> fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Id. at 1748.

D.R. Horton I attempted to distinguish *Concepcion* by arguing its decision did not require class arbitration. *D.R. Horton I*, *supra*, slip op. at 12. Rather, the panel claimed it required only the availability of class procedures in some forum, thus forcing employers to ***either*** (i) permit class arbitration, ***or*** (ii) waive the arbitral forum to the extent an employee seeks to invoke class procedures in court. *Id.* But that was a distinction without a difference. Like the California law, *D.R. Horton I* "condition[s] the enforceability of certain arbitration agreements" on the availability of class procedures. *Concepcion*, 131 S. Ct. at 1744. *D.R. Horton I*'s addition of the option of avoiding class arbitration only by agreeing ***to forgo arbitration*** does not reduce the degree to which its ban on class action waivers "interferes with fundamental attributes of arbitration" and "creates a scheme inconsistent with the FAA." *Concepcion,* 131 S. Ct. at 1748. To the contrary, requiring a party to abandon the arbitral forum altogether as the only way to avoid class arbitration is an even greater obstacle to the FAA's policies than mandating class arbitration alone.

Obviously, the Supreme Court's ruling interpreting the FAA is binding on the Board. *Jasso v. Money Mart Exp., Inc.*, 879 F. Supp. 2d 1038, 1048 (N.D. Cal. 2012) (concluding court was bound by *Concepcion*'s "statement of the meaning and purposes of the FAA" in determining whether FAA or NLRA controlled enforceability of arbitration agreement).[14]

[14] *Murphy Oil* did not attempt to defend *D.R. Horton I*'s effort to distinguish *Concepcion* on these grounds but instead unpersuasively dismissed *Concepcion* as merely dealing with federal preemption of state law. *Murphy Oil*, *supra*, slip op. at 9.

2. *D.R. Horton I* misapplied *Gilmer*.

D.R. Horton I also incorrectly concluded an individual employment arbitration agreement should not be enforced because doing so would require employees to forgo a substantive statutory right in violation of *Gilmer*. *D.R. Horton I, supra*, slip op. at 9-11. However, *D.R. Horton I*'s analysis was fundamentally inconsistent with *Gilmer*. In considering whether arbitration would violate an employee's substantive statutory rights, *D.R. Horton I* looked to the wrong statute (the NLRA rather than the FLSA), failed to ask the correct question (whether the employee could vindicate his or her FLSA rights effectively in arbitration), and came to the wrong answer (the arbitration agreement was unenforceable ***even if*** the employee could vindicate his or her FLSA rights effectively in arbitration).

The issue in *Gilmer* was whether a claim under the ADEA was subject to compulsory arbitration. *Gilmer,* 500 U.S. at 23. The Court observed, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id.* at 26 (citation omitted). The Court also confirmed that claims under statutes like the ADEA advancing important public policies may be arbitrated. "[S]o long as the prospective litigant effectively may vindicate [the] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (citation omitted).

Gilmer also explained that the burden is on the party opposing enforcement of an arbitration agreement to "show that Congress intended to preclude a waiver of a judicial forum" for the claim at issue. *Id.* at 26. The Court instructed that "[i]f such an intention exists, it will be discoverable in the text of [the statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.* (citation omitted).

The issue in *Gilmer* was thus whether an employee could vindicate his claim under the ADEA effectively in arbitration. The Supreme Court's other cases considering whether arbitration would violate a statutory right also considered whether a party could enforce a particular statutory claim effectively in arbitration. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985).

Contrary to *Gilmer* and every other Supreme Court case on point, *D.R. Horton I* failed to treat as dispositive the question whether an employee could vindicate his statutory rights under the FLSA effectively pursuant to the arbitration agreement's procedures. (*D.R. Horton I, supra*, slip. op. at 10 & n.23) Instead, *D.R. Horton I* reasoned that "the right allegedly violated *by the MAA* is not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA." (*Id.* at 10.)[15]

D.R. Horton I thus turned *Gilmer* on its head. In that case and others, the Supreme Court rejected a variety of challenges to arbitration procedures based on their differences from judicial procedures. Those cases concluded such differences did not *per se* render arbitration unsuitable for adjudicating statutory claims. Rather, statutory claims may be arbitrated, even though the arbitral procedures are different from judicial procedures, because those differences do not prevent a party from enforcing and obtaining relief on statutory claims.

D.R. Horton I ignored this fundamental teaching of *Gilmer* and its predecessors. Instead, *D.R. Horton I* held an arbitration agreement, to be enforceable under the FAA and the Act, ***must*** allow an employee to invoke certain procedures in the course of obtaining an adjudication of his

[15] *Murphy Oil* stood by *D.R. Horton I*'s mischaracterization of the substantive federal right allegedly at issue. *Murphy Oil, supra,* slip op. at 6 n.32.

or her statutory claims. This was directly contrary to *Gilmer* and related decisions, which held parties generally do ***not*** have a non-waivable right to obtain an adjudication of their federal statutory claims ***by a particular means***. *Gilmer*, 500 U.S. at 30-32; *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) ("At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims.").

Strikingly, *D.R. Horton I* held an arbitration agreement was unenforceable even if the employee could vindicate his FLSA rights effectively under it. *D.R. Horton I, supra,* slip op. at 9-10 & n.23. *D.R. Horton I* thus deemed the arbitration agreement void ***solely due to the means*** it provided for arbitrators to adjudicate claims, regardless of the outcome of the adjudication. That was the very opposite of *Gilmer*'s rationale.

Additionally, *D.R. Horton I* failed to apply *Gilmer*'s test for determining whether Congress intended to preclude the waiver of a judicial forum and its procedures for a statutory claim. As noted above, *Gilmer* requires a court to answer this question based on the relevant statutory text, the statute's legislative history, or an "inherent conflict" between arbitration and the statute's underlying purposes. *Gilmer,* 500 U.S. at 26. The Supreme Court has applied this test repeatedly. *E.g.*, *McMahon*, 482 U. S. at 227; *Mitsubishi Motors*, 473 U. S. at 628. It re-affirmed its commitment to this inquiry in *CompuCredit Corp.*, where it analyzed the text of the Credit Repair Organizations Act ("CROA") to determine whether Congress intended to override the FAA to preclude the arbitration of CROA claims. *CompuCredit Corp.*, 132 S. Ct. at 669. The *CompuCredit* Court also reiterated that ***if a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms."*** *Id.* at 673 (emphasis added).

D.R. Horton I never explored Congress' intention regarding the preclusion of arbitration for FLSA claims. If it had done so, it would have been compelled to find FLSA claims are subject to arbitration, as courts have repeatedly found. *See, e.g., Carter*, 362 F.3d at 297 (holding "there is nothing in the FLSA's text or legislative history" and "nothing that would even implicitly" suggest Congress intended to preclude arbitration of FLSA claims).

D.R. Horton I also failed to apply *Gilmer*'s test to the NLRA. *D.R. Horton I* did not look for any indication in the NLRA's text or history of a congressional intent to override the FAA and require that employees have access to class procedures. Indeed, to the extent *D.R. Horton I* considered the issue, it got the inquiry backwards, concluding "nothing in the text ***of the FAA*** suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." *D.R. Horton I, supra*, slip op. at 11 (emphasis added). If the *D.R. Horton I* panel had asked the correct question, it would have found "there is no language in the NLRA (or in the related Norris-LaGuardia Act) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA." *Jasso*, 2012 WL 1309171, at *8; *see also D.R. Horton II*, 737 F.3d at 360. Indeed, the simple fact that modern class procedures did not exist until decades after the NLRA was enacted makes it obvious Congress had no intention of the NLRA affecting employees' access to those procedures. Such "silence" in the NLRA means "the FAA requires the [MAA] to be enforced according to its terms." *CompuCredit Corp.*, 132 S. Ct. at 673.[16]

[16] *Murphy Oil* concedes "the NLRA does not explicitly override the FAA." *Murphy Oil, supra*, slip op. at 10. It argues there was an "obvious reason" for this silence: when the NLRA was enacted in 1935 and reenacted in 1947, the FAA had not yet been applied to employment arbitration agreements, which only occurred much later in 2001. *Id.* Notably, *Murphy Oil*'s reasoning in this regard nullifies *D.R. Horton I*'s conclusion that the 1932 NLGA directly repealed and the 1935 NLRA impliedly repealed the 1925 FAA with respect to individual employment arbitration agreements decades *before* the FAA was recognized as applying to employment arbitration agreements. *D.R. Horton I, supra*, slip op. at 12 & n.26.

In the end, *D.R. Horton I* simply declared there was "an inherent conflict" between the NLRA and the arbitration agreement's waiver of class procedures. *D.R. Horton I, supra,* slip op. at 11. The panel cited no authority for this finding. Indeed, the Supreme Court has never voided an arbitration agreement on "inherent conflict" grounds. To the contrary, courts have repeatedly found no "inherent conflict" between arbitration and other statutes. *See, e.g.*, *Gilmer*, 500 U.S. at 27-29 (no inherent conflict between arbitration and the ADEA); *Rodriguez*, 490 U.S. at 485-86 ("resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act"); *McMahon*, 482 U.S. at 242 (no inherent conflict between arbitration and RICO's private treble damages provision); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 680-81 (5th Cir. 2006) (no inherent conflict between arbitration and USERRA); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 477-78 (5th Cir. 2002) (no inherent conflict between arbitration and the Magnuson–Moss Warranty Act). *D.R. Horton I*'s unfounded and unreasoned declaration to the contrary was an empty reference to *Gilmer* without analyzing its substance. *Murphy Oil* did not add anything to support *D.R. Horton I*'s unfounded "inherent conflict" finding. *Murphy Oil, supra*, slip op. at 10.

3. *D.R. Horton I* erred in finding an arbitration agreement waiving class procedures unenforceable on public policy grounds.

D.R. Horton I also incorrectly reasoned the FAA's savings clause permitted the Board to declare an arbitration agreement waiving class procedures unenforceable as contrary to public policy, but the panel's analysis failed for multiple reasons.

a. *D.R. Horton I* improperly applied a common-law balancing test to determine whether another federal statute manifests a public policy sufficient to avoid the FAA.

D.R. Horton I asked whether another federal statute might manifest a public policy that would void an arbitration agreement irrespective of the FAA. *D.R. Horton I, supra,* slip op. at

11-12. The panel treated the common law's "public policy" balancing test as giving it broad discretion to determine for itself whether the public policies underlying the NLRA and the NLGA rendered an arbitration agreement unenforceable despite the FAA's mandate and the absence of any indication that Congress intended to preclude individualized arbitrations. *Id.*

There is no precedent for applying this balancing test under the FAA. Indeed, "[t]here is not a single decision, since [the Supreme] Court washed its hands of general common-lawmaking authority, in which [it has] refused to enforce on 'public policy' grounds an agreement that did not violate, or provide for the violation of, some positive law." *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 68 (2000) (Scalia, J., concurring). Because the FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution," *KPMG LLP*, 132 S. Ct. at 25, an administrative agency cannot deviate from the congressional commands in the FAA based on the agency's own assessment of public policy and absent an equally clear congressional directive in another statute to the contrary. *See CompuCredit*, 132 S. Ct. at 672 (when Congress restricts the use of arbitration, it does so clearly). In *D.R. Horton I*, the panel improperly relied on its own determination of "public interests" rather than deferring to congressional purpose. *D.R. Horton I*, *supra*, slip op. at 11-12. *Murphy Oil* did not attempt to defend this aspect of *D.R. Horton I.*

b. There was no precedent for *D.R. Horton I*'s holding that arbitration agreements waiving class procedures conflict with the Act.

In any event, *D.R. Horton I* did not cite any decision during the NLRA's nearly 80-year history holding a contract unenforceable because it interfered with employees' general "right to engage in protected concerted action." The panel cited only a number of decisions pre-dating the Supreme Court's decision in *J.I. Case* in which various individual employment agreements were held unlawful under the NLRA because employers used them to violate certain specific,

well-defined rights granted employees in Section 7, not the general "right to engage in protected concerted action."

Indeed, *D.R. Horton I* failed to acknowledge that Section 7's rights run from the well-defined and specific – for example, the rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing" – to the very general, such as the right "to engage in other concerted activities for the purpose of . . . other mutual aid or protection." 29 U.S.C. § 157. In every decision *D.R. Horton I* cited, a court held unlawful an individual agreement that attempted to restrict one of the specific, well-defined rights protected in Section 7; ***none*** held an agreement void because it allegedly violated an employee's far more amorphous Section 7 right to engage in concerted activities for mutual aid or protection. *D.R. Horton I*, *supra*, slip op. at 4-5 & n.7.[17]

For example, in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), an employer refused to recognize a union and established a committee to negotiate individual employment contracts in lieu of collective bargaining. The Supreme Court found the individual contracts "were the fruits of unfair labor practices, stipulated for the renunciation by the employees of

[17] *See, e.g., Western Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir. 1943) (individual agreements served "to forestall union activity" and "create a permanent barrier to union organization"); *NLRB v. Adel Clay Prods. Co.*, 134 F.2d 342, 345 (8th Cir. 1943) (individual contracts served "as a means of defeating unionization and discouraging collective bargaining"); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (under individual employment agreements, "the employee not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration"); *NLRB v. Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941) (individual contracts were unlawful where they waived employees' right to bargain collectively for a period of two years and were "adopted to eliminate the Union as the collective bargaining agency" of employees); *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 888-91 (7th Cir. 1941) (individual contracts were part of employer's plan to discourage unionization); *NLRB v. Vincennes Steel Corp.*, 117 F.2d 169 (7th Cir. 1941) (individual employment agreements were promulgated to circumvent union and required each employee to refrain from requesting a raise in wages, which "deprive[d] the employee of the right to designate an agent to bargain with reference thereto").

rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act." *Nat'l Licorice Co.,* 309 U.S. at 361.

Four years later, in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), an employer claimed it need not bargain collectively because it already had entered individual employment agreements with employees prior to a union being certified as their exclusive bargaining representative. The Supreme Court did *not void the individual agreements* but held their existence did not excuse the employer from bargaining collectively because each individual employment agreement would be superseded by the terms of any collective bargaining agreement. *J.I. Case Co.*, 321 U.S. at 336-38. The other decisions cited by *D.R. Horton I* all involved employers' use of individual employment agreements prior to *J.I. Case* to attempt to avoid employees' specific Section 7 rights to form or join labor organizations and engage in collective bargaining. *D.R. Horton I, supra*, slip op. at 4-5 & n.7.

D.R. Horton I claimed these decisions held individual agreements are unlawful merely because they "purport to restrict Section 7 rights." *Id.* at 4. But such an extrapolation went too far. *Cf., Webster v. Perales*, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008) (rejecting characterization of *National Licorice* as barring "individual contracts which purport to waive rights protected by Section 7" as too broad). *D.R. Horton I*'s citations showed only that there was a brief period before the Supreme Court's landmark decision in *J.I. Case* (holding that the terms of collectively bargained agreements can *supersede* those of individual employment agreements) during which courts invalidated individual agreements that employers used in willful attempts to avoid collective bargaining and interfere with well-defined and specific rights granted in Section 7. The employers in those cases acted with anti-union animus and required individual agreements for the very purpose of interfering with those well-defined Section 7 rights. The individual agreements served no legitimate purpose.

The decisions relied upon by *D.R. Horton I* were thus irrelevant to the validity of an ordinary arbitration agreement containing a class waiver. Indeed, the difference between those old cases cited by *D.R. Horton I* and an employer's routine use of an arbitration agreement with a class waiver are stark:

- Such an employer is obviously not attempting to use the arbitration agreement as a basis to avoid collective bargaining with a union, and often there is no union at issue at all.
- The only Section 7 right identified by *D.R. Horton I* was the very general right "to engage in . . . concerted activities for the purpose of . . . other mutual aid or protection." *D.R. Horton I*, *supra*, slip op. at 2. However, none of the decisions cited by *D.R. Horton I* relied on this highly generalized, catch-all provision of Section 7.
- There was no allegation or evidence that D.R. Horton (or any other employer) created its arbitration agreement for an improper purpose under the law, unlike the employers in the cases cited by the *D.R. Horton I* panel. To the contrary, Federal law recognizes the value and legitimacy of arbitration agreements and ***encourages*** them. *See Circuit City Stores*, 532 U.S. at 122-23 ("there are real benefits to the enforcement of arbitration provisions" in employment litigation). The Supreme Court has recognized that class-arbitration waivers, in particular, are legitimate and reasonable. *See Concepcion*, 131 S. Ct. at 1748.

D.R. Horton I's reliance on such dissimilar and irrelevant cases merely demonstrated there was no basis in the eight decades of jurisprudence under the NLRA for voiding arbitration agreements with class action waivers.

c. An arbitration agreement waiving class procedures is not the equivalent of retaliating against employees for concertedly asserting their legal rights.

Even if it had been appropriate for *D.R. Horton I* to weigh the public policies underlying the FAA and Act, the panel did so in an unreasonable way. *D.R. Horton I* equated requiring the waiver of class procedures as a condition of employment with retaliating against employees for exercising NLRA rights, relying on decisions in which employers terminated employees for filing lawsuits. *D.R. Horton I, supra,* slip op. at 2-3 & n.3.

There is no reasonable justification for treating a voluntary arbitration agreement containing a class-action waiver, required as a condition of employment, as equivalent to firing an employee because she concertedly sued her employer. The former involves action that is recognized by the law as legitimate. Again, federal law acknowledges individual employment arbitration yields benefits to the parties and public by reducing the burdens and costs of litigation while preserving individuals' ability to vindicate their claims. Therefore, when an employer declines to employ individuals who refuse to agree to individualized arbitration, the employer's actions are in furtherance of ends that Congress and the courts have deemed legitimate and beneficial. Moreover, the employer's actions do not adversely affect employees' substantive claims against the employer because they may vindicate such claims effectively through arbitration.

D.R. Horton I's "public policy" reasons for voiding individual arbitration agreements were improper grounds for it attempt to circumvent the FAA.

4. *D.R. Horton I* erred in finding the Norris-LaGuardia Act trumps the FAA.

D.R. Horton I also concluded the NLGA voided employment arbitration agreements with class action waivers and partially repealed the FAA so that it does not apply to employment

arbitration agreements containing class action waivers. *D.R. Horton I, supra*, slip op. at 5-6, 12. However, the NLGA is "outside the Board's interpretive ambit," 737 F.3d at 362 n.10, and as *Murphy Oil* conceded, the Board is not entitled to deference in interpreting the NLGA, *Murphy Oil, supra*, slip op. at 10. Moreover, *D.R. Horton I* failed to cite any court decision treating the NLGA as repealing the FAA.

D.R. Horton I's reliance on its novel interpretation of the NLGA should be rejected. Enacted in 1932, the NLGA divested federal courts of jurisdiction to issue restraining orders and injunctions "in a case involving or growing out of a labor dispute," except as provided therein. 29 U.S.C. § 101. The statute further provides that "yellow-dog" contracts – contracts in which an employee agreed "not to join, become, or remain a member" of a labor organization and agreed his employment would terminate if he did – are unenforceable in federal courts. *Id.* § 103. The statute also provided that any agreement "in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." *Id.*

D.R. Horton I concluded the NLGA "prohibit[s] the enforcement of . . . agreements comparable to" an individual employment arbitration agreement. But *D.R. Horton I*'s extension of the Norris-LaGuardia Act to individual arbitration agreements distorted history and the statute. *D.R. Horton I, supra*, slip op. at 5.

First, when the NLGA was adopted in 1932, the Federal Rules, the FLSA, and the modern class action device did not yet exist. To suggest the NLGA's public policy manifests any intention that employees have a substantive, non-waivable right to invoke class procedures that had not yet been adopted is extremely unreasonable.

D.R. Horton I's analogy to "yellow-dog" contracts also failed. If an employee promises to arbitrate individually and is hired, but then files a class action lawsuit in breach of the promise, an arbitration agreement does not provide the employee's employment will terminate for having done so, as would occur under a "yellow-dog" contract. Rather, an employer will simply move to compel individualized arbitration under the FAA, without any effect on employment status whatsoever.

Even assuming some conflict might exist between the NLGA and the FAA, it would be up to courts, not the Board, to resolve that conflict between two Federal statutes outside the Board's jurisdiction. *See, e.g.*, *Owens v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013) (on employer's motion to compel arbitration under the FAA, addressing employee's challenge to enforceability of individual arbitration agreement based in part on NLGA).

Moreover, if there existed a conflict between the NLGA and the FAA, courts would likely "reconcile" the decades-old NLGA with the Supreme Court's more recent jurisprudence under the FAA. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250-252 (1970). Indeed, the Supreme Court has made clear that the NLGA must accommodate the substantial changes in labor relations and the law since it was enacted. In *Boys Markets*, the Court considered whether the NLGA prohibited a federal court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement when that agreement provided for binding arbitration of the dispute that was the subject of the strike. The Court concluded the NLGA "must be accommodated to the subsequently enacted" Labor Management Relations Act ("LMRA") "and the purposes of arbitration" as envisioned under the LMRA. *Boys Market, Inc.*, 398 U.S. at 250. The Court noted that through the LMRA, Congress attached significant importance to arbitration as a means of settling labor disputes. *Id.* at 252.

The Court found "[t]he Norris-LaGuardia Act was responsive to a situation totally different from that which exists today." *Id.* at 250. At the time it was passed, federal courts regularly entered injunctions "against the activities of labor groups." *Id.* To stop this, Congress passed the NLGA "to limit severely the power of the federal courts to issue injunctions" in cases involving labor disputes. *Id*. at 251. However, in following years, Congress' focus "shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Id.* Because this "shift in emphasis" occurred "without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act," "it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." *Id.*

Here, even if the NLGA could be construed as applying to individual employment arbitration agreements, that construction would have to give way in light of the FAA and subsequent developments. An arbitration agreement with a class action waiver is clearly not "the type of situation to which the Norris-LaGuardia Act was responsive." *Id.* at 251-52. An employment arbitration agreement is unrelated to the NLGA's core purpose of fostering the growth of labor organizations at the dawn of the last century. Furthermore, just as the LMRA manifests a strong congressional policy in favor of labor arbitration, the FAA evinces a strong policy in favor of the enforcement of arbitration agreements. Just as the NLGA must be viewed as accommodating Congress' intentions under the LMRA, so too must it accommodate Congress' intentions under the FAA.

Finally, *D.R. Horton I* got its chronology wrong in evaluating whether the NLGA and/or the NLRA should be viewed as partially impliedly repealing the FAA. *D.R. Horton I* assumed the FAA was enacted in 1925 and predated both the NLGA and the NLRA. *D.R. Horton I, supra*, slip op. at 8. Therefore, if the FAA conflicted with either of those statutes, *D.R. Horton I*

reasoned the FAA must have been repealed, either by the NLGA's express provision repealing statutes in conflict with it or impliedly by the NLRA. *Id.* at 12 & n.26.

However, *D.R. Horton I* failed to account for the dates when the NLRA and FAA were ***re-enacted.*** Those are the relevant dates for this analysis. *See Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to re-enactment date of the Railway Labor Act to determine that it post-dated the NLGA and concluding "[i]n the event of irreconcilable conflict" between the two statutes, the former would prevail).

The NLGA was enacted in 1932 and never re-enacted; the NLRA was re-enacted June 23, 1947; and the FAA was re-enacted July 30, 1947. *See* 47 Stat. 70; 61 Stat. 136; 61 Stat. 670. Accordingly, of these three statutes, the FAA is the most recently re-enacted. If there were any "irreconcilable conflict" among them, the FAA would thus prevail.

Murphy Oil states the FAA's reenactment in 1947 should not be viewed as altering the scope of the NLGA or NLRA. *Murphy Oil* reasons "[i]t seems inconceivable that legislation effectively restricting the scope of the [NLGA] and the NLRA could be enacted without debate or even notice." *Murphy Oil*, *supra*, slip op. at 11. However, *D.R. Horton I* and *Murphy Oil* nevertheless assume the NLGA's enactment in 1932 and the NLRA's in 1935 restricted the scope of the 1925-enacted FAA with respect to the enforceability of arbitration agreements "without debate or even notice." Rather than speculating which statute silently and impliedly repealed or amended the other, it is far more plausible to read the NLGA and NLRA as simply not in conflict with the FAA because neither of those statutes concerns the enforceability of individual employment arbitration agreements.

For all of these reasons, *D.R. Horton I* should be overturned because it is contrary to the FAA.

IV. The ALJ erred in finding that Hobby Lobby's MAA violates the NLRA.

The Board should reject the ALJ's conclusion that Hobby Lobby's MAA violates the NLRA based on *D.R. Horton I* and other grounds.

A. The MAA does not violate the NLRA because *D.R. Horton I* was wrongly decided.

For all of the reasons set forth above, the NLRA does not provide employees a non-waivable right to access class procedures, contrary to *D.R. Horton I*'s erroneous conclusion. As the ALJ in *D.R. Horton* held before the Board issued its *D.R. Horton I* decision, there has never previously been any "Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims." *D.R. Horton I*, *supra*, slip op. at 16. The Board should revert to that view, and the complaint in this case should be dismissed.

B. The Board should also reject the ALJ's erroneous conclusion that the MAA does not fall under the FAA because the MAA allegedly does not involve interstate commerce.

In addition to the ALJ's reliance on *D.R. Horton I*, the ALJ also held that the MAA—despite covering the employment of more than 72,000 employees spread across 47 states and applying to disputes arising out of that employment—does not "affect" interstate commerce and therefore is not covered by the FAA. (ALJD p. 3, 6, 10-15.) The ALJ's decision in this regard is directly contrary to Supreme Court precedent and should be rejected out of hand.

The ALJ noted the FAA applies to a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . ." (ALJD p. 10 (quoting 9 U.S.C. § 2).) The ALJ acknowledged the Supreme Court held in *Circuit City* that employment arbitration agreements are generally covered by the FAA. (ALJD p. 11 & n.10 (citing *Circuit City*, 532 U.S. 105).) Nevertheless, the ALJ held that the FAA does not apply to Hobby Hobby's MAA because there was no evidence

that Hobby's Lobby's MAAs involve commerce. (ALJD p. 15.) The ALJ's analysis and conclusion are plainly wrong.

Hobby Lobby's MAA provides that it is "made in consideration for the continued at-will employment of Employee, the benefits and compensation provided by Company to Employee, and Employee's and Company's mutual agreement to arbitrate as provided in this Agreement." (ALJD p. 4 (quoting Jt. Exs. 2I & 2J).) In *Circuit City*, the Supreme Court held that a similar arbitration agreement was subject to the FAA. There, as here, employees signed an arbitration agreement as a condition of employment. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1072 (9th Cir. 1999). That agreement included a number of disclaimers, including a statement that "I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me." *Id.* The Agreement also stated that it "in no way alters the 'at-will' status of my employment." *Id.*

Although the agreement in *Circuit City* involved an at-will employment relationship and expressly stated it was not a "contract of employment," the Ninth Circuit held that the agreement was a "contract of employment" for purposes of the FAA. *Id.* The Supreme Court subsequently let stand the Ninth Circuit's conclusion that the arbitration agreement was a "contract of employment" for purposes of the FAA, despite reversing other aspects of the Ninth Circuit's decision. *See* 532 U.S. at 113 (refusing to consider argument that the arbitration agreement was not a "contract of employment" under the FAA). Thus for nearly fifteen years, it has been settled that arbitration agreements like the MAA entered into as a condition of at-will employment are contracts covered by the FAA. *See also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("Employment contracts, except for those covering workers engaged in transportation, are covered by the FAA."). The Board should therefore reject the ALJ's tortured

reasoning to the contrary that disregards Supreme Court precedent and a decade-and-a-half of federal and state court decisions relying on that precedent.

The Board also should reject the ALJ's suggestion that Hobby Lobby is required to produce evidence that every individual MAA with each of its 72,000+ current and former employees involves commerce to demonstrate that the FAA applies to them. (ALJD pp. 14-15.) That finding also is contrary to Supreme Court precedent.

The Supreme Court has made clear the FAA's reach is as broad as Congress's Commerce Clause power. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Court has also repeatedly made clear the Commerce Clause power "'may be exercised in individual cases without showing any specific effect upon interest commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *Id.* at 56-57. Thus, according to the Supreme Court, the FAA applies to transactions if the general practice they represent "bear[s] on interstate commerce in a substantial way." *Id.* at 57. Based on this reasoning, *Citizens Bank* held that an arbitration agreement relating to debt-restructuring agreements between Alabama residents was covered by the FAA. *Id.* at 58 ("No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause.")

Here, the Supreme Court *already has held* arbitration agreements relating to employment and entered as a condition of employment, like Hobby Lobby's MAA, are subject to the FAA. *See Circuit City*, 532 U.S. 105; *Waffle House*, 534 U.S. 279. Neither *Circuit City* nor *Waffle House* suggests that each employment arbitration agreement must individually be shown to involve commerce to fall within the FAA's coverage.[18] To the contrary, as in *Citizens Bank,*

[18] The ALJ's reliance on *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) is misplaced. That old decision long predates the Supreme Court's holdings in *Circuit City* that the

there is no need for an elaborate explanation to make evident the broad impact of employment on the national economy or Congress' power to regulate employment matters. Indeed, if there were any question about Congress's power to regulate employment generally or apply federal legislation to specific employment relationships, issues and disputes, ***the validity of the NLRA itself would be in doubt***, as would the Board's and the ALJ's authority under the NLRA to rule on an unfair labor practice charge involving an employment arbitration agreement.

C. The Board should also reject the ALJ's erroneous conclusion that the MAAs with Hobby Lobby's team truck drivers violate the NLRA.

The ALJ also concluded that Hobby Lobby's "team truck drivers" are not covered by the FAA pursuant to Section 1 of that statute. (ALJD pp. 15-16.) As an initial matter, the record lacks any evidence relating to any team truck driver's duties, beyond the bare fact that drivers transport Hobby Lobby's products across state lines. (Jt. Stipulation ¶ 4(b).) But merely crossing state lines is not sufficient to cause employees to fall within Section 1's exception from the FAA. *See, e.g., Hill v. Rent-A-Ctr., Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005) (in enacting Section 1 of the FAA, Congress was not concerned about all transportation activities, such as those "of an interstate traveling pharmaceutical salesman who incidentally delivered products in his travels," but only with those employees working "in the transportation industry"). The ALJ failed to cite any evidence or authority showing that Hobby Lobby—a retailer—or any of its employees are in the "transportation industry" within the meaning of Section 1 of the FAA.

Moreover, irrespective of the FAA, the NLRA cannot reasonably be construed to grant employees a non-waivable right to class procedures. *See supra* at Section II. Thus, even if the

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FAA applies to employment arbitration agreements and in *Citizens Bank* clarifying that the FAA does not require individualized showings of involvement in commerce. *See, e.g., Collie v. Wehr Dissolution Corp*., 345 F. Supp. 2d 555, 561 (N.D.N.C. 2004) (rejecting argument that FAA did not apply to employment arbitration agreement based on *Bernhardt*).

FAA does not apply to Hobby Lobby's team truck drivers, the ALJ's holding that requiring them to enter into the MAA violates the NLRA is unsustainable.

V. The MAA cannot reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board.

The ALJ also held that employees would reasonable construct the MAA as restricting their access to file charge with the Board. (ALJD p. 17.) The ALJ held this constituted a separate violation of Section 8 of the NLRA. (ALJD pp. 17-18.) This finding also was in error.

If a work rule does not explicitly restrict activities protected by Section 7 of the Act, the Board will find the rule or policy unlawful only if (1) employees would reasonably construe the language to prohibit protected Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004).

Here, none of these three circumstances exists. The Company did not promulgate the MAA in response to union activity. Nor has the rule been applied to restrict the exercise of Section 7 activity. Finally, no employee could reasonably misinterpret the MAA as prohibiting Section 7 activity, including the filing of unfair labor practice charges with the Board. *See, e.g., Tiffany & Co.,* 200 L.R.R.M. (BNA) ¶ 2069 (NLRB Div. of Judges Aug. 5, 2014) (finding a confidentiality clause lawful when it expressly excluded protected concerted activity from its coverage). The MAA expressly advises employees it does ***not*** apply to their filing complaints with federal or state agencies. The MAA states:

> By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state or municipal law (***including the right to file claims with federal, state or municipal government agencies***).

(Joint Ex. 2I at p. 55 (emphasis added); Joint Ex. 2J at p. 56 (emphasis added).)

The Fifth Circuit recently made clear that it would ***not*** be reasonable for employees to read an arbitration agreement like the MAA as prohibiting them from filing charges with the Board where the agreement states explicitly that it does not do so. The Court explained:

> Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite.

Murphy Oil, 2015 WL 6457613, at *5.

Here, the MAA explicitly states that it does ***not*** apply to employees' "right to file claims with federal, state or municipal government agencies." (Joint Ex. 2I at p. 55 (emphasis added); Joint Ex. 2J at p. 56 (emphasis added).) Because the MAA says it does ***not*** apply to such claims, which would include unfair labor practice charges filed with the Board, it would be unreasonable for employees to read the MAA otherwise.

Moreover, neither the General Counsel nor the Charging Party offer ***any evidence*** that any employee has ever misinterpreted the MAA as prohibiting his or her filing claims with the Board or any other federal, state, or municipal government agency. In light of the explicit statement in the MAA that it does not prohibit such complaints, any such alleged misinterpretation of the MAA would be manifestly unreasonable.

VI. Hobby Lobby's enforcement of the MAA through its motions to compel arbitration does not violate Section 8(a)(1) of the Act.

The ALJ also found that Hobby Lobby violated the NLRA by enforcing the MAA, including by filing motions to compel in *Fardig* and *Ortiz*.[19] (ALJD pp. 16-17.) The ALJ

[19] The ALJ also found that Respondent violated Section 8(a)(1) of the Act when it enforced the MAA by asserting the MAA in litigation the Charging Party brought against the Respondent. (ALJD p. 19.) Respondent objects to this finding as clearly erroneous. No evidence was introduced to show that the Charging Party (a "committee") comprises any employees or applicants for employment with Respondent, nor is there any evidence that the Charging Party has ever filed suit against Respondent, much less that Respondent has ever tried to "assert the MAA" against the Charging Party in such litigation.

recommended that Hobby Lobby be ordered to withdraw its motions to compel in *Fardig* and *Ortiz* and be ordered to reimburse employees for any litigation costs relating to its motions to compel. (ALJD p. 19.)

The findings and remedies ordered by the ALJ are improper because, as shown above, Hobby Lobby did not engage in any unfair labor practices.[20] In addition, the findings and remedies deprive Hobby Lobby of its own rights, including its First Amendment right to petition and litigate.

The Supreme Court has explained the limits on the Board's power to deem employer litigation an unfair labor practice. As recently summarized by the Fifth Circuit,

> To be enjoinable . . . the lawsuit prosecuted by the employer must (1) be "baseless" or "lack[ing] a reasonable basis in fact or law," and be filed "with the intent of retaliating against an employee for the exercise of rights protected by" Section 7, or (2) have "an objective that is illegal under federal law."

Murphy Oil, 2015 WL 6457613, at *6 (quoting *Bill Johnson's Restaurants*, 461 U.S. at 737 n.5, 744, 748).)

Here, on June 13, 2014, the U.S. District Court granted Respondent's motion to compel individual arbitration under the MAA. *See Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025 (C.D. Cal. June 13, 2014). On October 1, 2014, another U.S. District Court in *Ortiz* granted Respondent's motion to compel individual arbitration under the MAA. *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070 (E.D. Cal. 2015). These rulings are *per se* evidence that

[20] Respondent further objects to the ALJ's finding that Respondent committed an unfair labor practice by filing a motion to compel individual arbitration in *Ortiz* – a single-plaintiff case – on the basis that there is no record evidence to support the ALJ's implicit finding that the lone plaintiff in *Ortiz* was engaged in protected concerted activity within the meaning of the Act. To the extent the Board's recent decision in *200 East 81st Restaurant Corp. d/b/a Beyoglu*, 362 NLRB No. 152 (July 29, 2015) holds that a single employee's filing of an employment-related class or collective action is by definition concerted activity, that presumption is contrary to actual litigation practice and should be abandoned.

Hobby Lobby's Motions to Compel had a reasonable basis in law. Indeed, both courts expressly rejected arguments that the arbitration agreements were unenforceable based on the NLRA, and the Board should be bound by collateral estoppel based on those decisions. *See, e.g.*, *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 38 (1st Cir. 1987) (finding Board was collaterally estopped from re-deciding contract-formation issues already decided by district court).

Moreover, as in *Murphy Oil II*, there is no basis to find Hobby Lobby's enforcement of its MAA in these cases was baseless, retaliatory, or with an objective that is illegal under federal law. The evidence shows only that certain employees filed lawsuits in breach of the MAA and that Hobby Lobby, relying on extensive federal case law, defended itself in those lawsuits by seeking to enforce the MAA.

The ALJ's finding that Hobby Lobby's enforcement of the MAA in *Fardig* and *Ortiz* was unlawful was based entirely on the Board's decision in *D.R. Horton I.* However, the Fifth Circuit recently rejected a similar finding in *Murphy Oil*. There, the Fifth Circuit explained:

> [T]he Board's holding is based solely on Murphy Oil's enforcement of an agreement that the Board deemed unlawful because it required employees to individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. 737 F.3d at 362. Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an "illegal objective" in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

2015 WL 6457613, at *6.

Here, Hobby Lobby likewise relied on multiple federal and state court decisions in moving to compel arbitration under the MAA. Although the Board may disagree with those decisions, that disagreement does not mean that Hobby Lobby had no basis in fact or law or an "illegal objective" in relying on them. Those decisions, including now *D.R. Horton II* and *Murphy Oil II*, remain good law that has not been overruled by the Supreme Court.

Moreover, the Supreme Court has repeatedly made clear that these types of agreements, even if they include class or collective action waivers, are lawful and enforceable under the FAA. *See American Express Co. v. Italian Colors Restaurant*, 570 U.S. ___, 133 S.Ct. 2304 (2013) and *Concepcion*, 131 S.Ct. 1740.

Because Hobby Lobby had a constitutional right to petition the courts, and its motions did not fall under any *Bill Johnson's* exception, the ALJ's decision, recommended remedy, and proposed order in this case must be rejected.

CONCLUSION

For all of the foregoing reasons, the Board should reverse the ALJ and dismiss the Complaint against Respondent in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 12, 2015, a copy of the foregoing *Respondent's Brief in Support of its Exceptions to the Decision of the Administrative Law Judge and its Request for Oral Argument* has been filed via electronic filing with:

Executive Secretary
National Labor Relations Board
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